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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. [redacted] 96

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

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CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3 2

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KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

Custom Built Homes Co., Inc., respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Kansas entered in the above-entitled cause on January 24, 1959.

OPINIONS BELOW.

The finding of facts and law and order of the State Commission of Revenue and Taxation of the State of Kansas

(Tr. 6-8, A1-A3)[1] are not reported, nor are the findings of fact and conclusions of law of the District Court for Johnson County, Kansas (Tr. 25-29, A4-A7). The opinion of the Supreme Court of Kansas is reported in 184 Kan. 31, 334 P.2d 808 (1959).

JURISDICTION.

Jurisdiction in this Court is conferred by 28 U.S.C., Sec. 1257 (3), 62 Stat. 929. The judgment of the Supreme Court of Kansas sought to be reviewed was entered on January 24, 1959. A timely Motion for Rehearing was denied March 11, 1959.

QUESTION PRESENTED FOR REVIEW.

Whether or not the State of Kansas may collect a Compensating Use Tax assessed against the use of tangible personal property when said property is in a continuous interstate journey until the moment it is affixed to and becomes a part of real estate within the State of Kansas.

CONSTITUTIONAL PROVISION INVOLVED.

This case involves the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States:

> "Congress shall have power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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[1]Citations preceded by the letters Tr. refer to pages of the Transcript of Record certified by the Clerk of the Kansas Supreme Court. Citations preceded by the letter A refer to pages in the Appendix to this petition.

STATEMENT OF THE CASE.

This case arises out of a Use Tax assessment made by the respondent against the petitioner herein on the alleged use of tangible personal property between the periods from October 1, 1951 to September 30, 1958, inclusive.

During this period of time your petitioner, Custom Built Homes-Co., Inc., was engaged in the business of selling houses in a housing development in Wyandotte County, Kansas. The houses so sold were prefabricated houses, purchased by petitioner under contract from Page & Hill Homes, Inc., a Minnesota corporation. Under the terms of the contract Page & Hill was to deliver the houses "F.O.B. Building Site, Wyandotte County, Kansas".

The houses were delivered in the following manner: the prefabricated sections were loaded onto the Page & Hill trucks at its factory in Minnesota, and the trucks were driven to the building site by Page & Hill employees. Upon entering the area, the Page & Hill operators were directed to a particular foundation which had previously been laid and covered with subflooring by petitioner's employees. On arriving at such foundation, the Page & Hill operator would unload the prefabricated sections by means of a crane attached to the truck. He would hook the crane onto the section in the truck and swing said section into place on the foundation. While the sections were still hooked to the crane, they would be nailed in place. After the sections were thus secured the crane hook would be released. This process was used for exterior and interior sections constituting about 75% of the house.

The roof and ceiling sections, comprising about 15% of the total dollar value of the house, were unloaded manually, and by the use of rollers, but were moved directly

from the truck to their position on the house. Miscellaneous loose items, constituting 10% of the house, were unloaded manually and in some instances stored temporarily, and in other instances, applied directly to the house. Petitioner does not contest the tax on said loose items.

As a part of the financing of the construction, Page & Hill took a mortgage on the lots to which the prefabricated houses were to be attached.

The parties have stipulated that the assessment herein is $22,133.57 plus $1,257.33 interest, plus interest at the rate of one percent (1%) per month from June 24, 1955 on $22,133.57.

This cause was first heard by the State Commission of Revenue and Taxation of the State of Kansas on March 29, 1956. The petitioner herein raised the interstate commerce question in its brief submitted to the Commission and by oral argument. The Commission, in its Order, found (Tr. 7):

> "7. That the Custom-Built Homes Inc., did use, store and consume tangible personal property within the State of Kansas after it ceased to be a part of interstate commerce, within the contemplation of the Kansas Compensating Tax Law."

The decision of the State Tax Commission was appealed to the District Court of Johnson County, Kansas. In the Notice of Appeal (serving as the petition for review) petitioner reiterated its position that the prefabricated house sections were continuously in interstate commerce until becoming affixed to the real estate (Tr. 11, 12). The hearing upon the appeal was held May 28, 1957. In its Journal Entry filed February 17, 1958 (Tr. 25-29), the District Court found that title to the interior and exterior sections passed to petitioner at the instant the crane hooks

were disconnected from the prefabricated sections, and that at said time the sections were only temporarily affixed to the foundation and were, therefore, tangible personal property subject to the Use Tax. The Court also found that title to the roof and ceiling sections and the loose items passed at the time said items were unloaded from the truck, and that these items also constituted taxable tangible personal property at said time. The District Court in its Conclusions of Law (Tr. 29) thus ruled:

> "3. That the order made by the Commission of Revenue and Taxation of the State of Kansas is valid and not repugnant to the Constitution of the United States or the laws of the State of Kansas."

Petitioner's Motion to Amend and Reconsider the District Court's finding (Tr. 30) was overruled (Tr. 31).

Thereupon, petitioner appealed to the Kansas Supreme Court alleging in its Specifications of Error (Tr. 34-36) that the Conclusions of Law of the District Court were not supported by and were contrary to the evidence.

The Kansas Supreme Court acknowledged the following to be the controlling issue herein (A8):

> "The question presented is whether under a sales contract the appellant used, stored or consumed prefabricated house sections as tangible personal property within the State of Kansas after said sections had ceased to be a part of interstate commerce and prior to their becoming affixed as real estate within the State."

The Court (A19) also acknowledged that the time when title is deemed to pass need not correspond with the time when the interstate commerce journey ceases. Nevertheless, the Court proceeded to first determine the question of when title passed to petitioner. Reversing the

District Court, it found that the terms of the Custom Built-Page & Hill contract, "F.O.B. Building Site in Wyandotte County", clearly and unambiguously meant that title passed upon delivery to petitioner free on board the semi-trailer at the building site in Wyandotte County, Kansas, thus holding that title to all of the items passed as they were taken off the semi-trailer.

On the interstate commerce question, the Court held (A26):

> "We have no hesitance in declaring that at some point after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property and as such was used, stored or consumed by the appellant within the contemplation of the Kansas Compensating Tax Act prior to its becoming affixed as real property."

In its Motion for Reconsideration and Reversal of the Opinion or in the Alternative, Motion for Rehearing, which was denied on March 11, 1959, petitioner again raised the interstate commerce issue (Tr. 62-71).

Petitioner herein seeks review of the decision of the Kansas Supreme Court.

REASONS FOR GRANTING THE WRIT.

Since *Coe* v. *Errol*, 116 U.S. 517 (1886), this Court has repeatedly and uncontrovertedly held that personal property while in transit in an interstate commerce journey is immune from state and local taxes. The mere imposition of such a tax constitutes an interference with, and places an undue burden upon, interstate commerce. *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938).

The general rule applicable to the instant fact situation has been enunciated by this Court in *Henneford* v. *Silas*

Mason Co., 300 U.S. 577 (1937) and *Southern Pac. Co. v. Gallagher*, 306 U.S. 167 (1939). In each of these cases a State Use Tax was upheld as Constitutional because, and only because, there existed a taxable moment or event after the interstate commerce journey had ceased, and that during this taxable moment the taxpayer used the property while said property was within the taxable jurisdiction of the State. Both decisions emphasize that in absence of the taxable moment the tax would have been forbidden as an Unconstitutional burden.

In the instant case there was no taxable moment to support an assessment of the State Tax, and thus the decision reached by the Kansas Supreme Court is in direct conflict with the foregoing rule.

The interstate journey of these prefabricated houses began with the loading of the prefabricated sections on the Page & Hill trailer-tractor in Minnesota and did not end until said sections had been affixed to real estate in Wyandotte County, Kansas.

The question presented by this petition for certiorari has not been previously decided, but has become one of exceeding importance in the recently innovated, but rapidly expanding field of prefabricated home manufacturing, delivery and construction. This industry has developed in the last seven or eight years *from* the experimental stage to constitute a sizable portion of the home building industry and from a few manufacturers to a field of approximately 42 manufacturers, members of the Home Manufacturing Association, doing business on a nation-wide basis. Recent publications indicate that the industry has grown to an approximate 10% of the home building industry involving the annual construction of an excess of 100,000 homes and an annual sales volume in excess of $1,000,000,000. The prefabricated house sections are manu-

factured at a plant location, shipped in interstate commerce to the various states of the Union. They are delivered in manners very similar to the delivery in this case, and thus the particular question raised by this petition is not unique, but one of tremendous import, to a very sizable segment of one of the Nation's important industries.

The crucial question in determining whether or not the State taxing power may be exerted is that of continuity of transit. *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929), *State of Minnesota* v. *Blasius*, 290 U.S. 1 (1933). As this Court pointed out in the *Blasius* case, the question of cessation or interruption of an interstate journey is always one of substance and the particular occasion or event sought to be taxed must be considered.

Here there was no break in the continuity of transit. Petitioner submits that as a practical matter and by virtue of the understanding between Custom Built Homes Co., Inc., and Page & Hill, the houses were not "delivered" until they had been unloaded by the Page & Hill crane. When the unloading was completed, the sections had become a part of the realty. That the act of unloading does not break the continuity of transit and thereby end the interstate commerce journey is supported by a number of decisions by this Court, as well as cases decided in the Courts of Appeal.

In *Baltimore & O. S. W. R. Co.* v. *Burtch*, 263 U.S. 540, 544 (1929), this court said:

> "It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it."

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90 (1937), a gross receipts tax on the company's

income was invalidated because the act of loading and unloading merchandise from an interstate carrier is an integral and essential part of the interstate journey. This court also said at l.c. 92:

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel."

The foregoing result was reaffirmed in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), and it was therein specifically stated that stevedoring was obviously a continuation of the transportation.

In *Walling* v. *Consumers Co.*, 149 F.2d 626, 630 (7 Cir. 1945), it was held that:

> "the unloading at destination of an interstate shipment is work in interstate transportation whether done by the carrier or another."

The decision of the Kansas Supreme Court suggests in part that because the petitioner's employees assisted the Page & Hill crane operator in unloading, by guiding the sections into place, that the interstate commerce journey had ceased. That such a conclusion is erroneous is illustrated by the following quotation from *Puget Sound Stevedoring Co.* v. *Tax Commission, supra*, l.c. 94:

> "What is decisive is the nature of the act, not the person of the actor."

Petitioner believes that the Kansas Supreme Court erred in, after three years of litigation, determining that the contractual provision for delivery "F.O.B. Building Site Wyandotte County, Kansas", clearly and unambiguously meant that title passed before the property was unloaded, particularly in view of the diametrically opposed finding of fact of the lower fact finding court. But, notwithstanding this result, petitioner submits that the apparent

inference from the decision of the Kansas Supreme Court that the interstate journey ended at the same time title passed is wholly erroneous. The established rule, and the logical one, is that the interstate character of a shipment is to be determined entirely independent from the question of when and to whom title passes. *United States* v. *Erie R. Co.*, 280 U.S. 98 (1929). *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601 (1939). *Wycoff Co.* v. *Public Service Commission of Utah*, 195 F.2d 252 (10 Cir. 1951). As stated in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943):

> "The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate."

Petitioner further submits that there was no evidence before the Kansas Supreme Court to support an independent finding that the interstate commerce journey ceased before the property became affixed to realty.

The cases in this field of state taxation in which tax assessments have been upheld have all been conditioned upon an express finding of a taxable event separate and distinct from the movement of the goods in interstate commerce. *Joseph* v. *Carter & Weekes Stevedoring Co.*, *supra*. Without such a taxable event, the application of the tax is invalid. As stated in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166 (1954), wherein the Court invalidated a tax assessed upon the "incident" of taking gas from an independent outlet for the purpose of immediate interstate transmission:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid

if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

In the instant case the local activity, the "use" by petitioner, cannot realistically be distinguished from the unloading, and since the unloading was a part of the interstate process, the alleged "use" cannot be separated from the interstate commerce.

Petitioner submits that a decision by this Court on the question herein presented would clarify many existing uncertainties troubling both state tax officials and private industries attempting to reconcile the permissive application of Use Taxes with the Commerce Clause.

CONCLUSION.

Petitioner, therefore, respectfully requests, for the foregoing reasons, that this Court issue a writ of certiorari to the Kansas Supreme Court to review this case.

Respectfully submitted,

PAUL VAN OSDOL, JR.,
Counsel for Petitioner.

CHARLES W. HESS,
Of Counsel.

CUSTOM BUILT HOMES CO., INC.,
Appellant,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Appellee.

Order of the State Commission of Revenue and Taxation of the State of Kansas.

Now, on this 29th day of March, the above matter comes on regularly for hearing before the State Commission of Revenue and Taxation of the State of Kansas.

The taxpayer appears by Fred Hornaman, President, Charles Hess, Secretary, and Ed Sondker, Attorney. The Director of Revenue, Neil L. Toedman, appears in person and by Harry Kendall, Chief of the Compensating Division and H. R. O'Hara, Chief Accountant.

The Commission, after examining the file, transcript and brief and being fully advised in the premises, finds:

(1) That Custom Built Homes, Inc., engaged in the business of developing and selling prefabricated homes in Stony Point Heights Addition in Wyandotte County, Kansas.

(2) That Custom Built Homes, Inc., entered into a contract to purchase prefabricated homes from Page and Hill, Inc., a Minnesota corporation; that under the contract Page and Hill, Inc., was to deliver said houses in sections to the building sites.

(3) That Custom Built Homes, Inc., purchased lots and erected such foundations as were necessary and constructed thereon a platform constituting a flooring from raw material upon which the Kansas sales tax was paid.

(4) That Page and Hill, Inc., delivered the prefabricated sections to the building site and unloaded said sections by means of a crane, which was attached to the delivery truck.

(5) That said sections were swung into place by said crane and were held in the proper position until said sections were fastened to the real estate by means of wooden pegs and nails.

(6) That said sections were fastened to the realty by employees of Custom Built Homes, Inc.

(7) That the Custom Built Homes, Inc., did use, store and consume tangible personal property within the State of Kansas after it ceased to be part of interstate commerce, within the contemplation of the Kansas Compensating Tax Law.

(8) That the assessment of compensating tax made by the Director of Revenue against Custom Built Homes, Inc., in the amount of $22,133.57, tax, should be sustained; that the interest herein should be reduced from $2,514.67 to $1,257.33.

IT IS THEREFORE, BY THE STATE COMMISSION OF REVENUE AND TAXATION OF THE STATE OF KANSAS CONSIDERED AND ORDERED that the assessment of compensating tax in the amount of $22,133.57, made by the Director of Revenue against Custom Built Homes, Inc., should be and the same is hereby sustained; that the interest herein should be and the same is hereby reduced from $2,514.67 to $1,257.33; that there is due and owing from the taxpayer the sum of $23,390.90; and that said amount is hereby ordered paid within thirty days of the receipt of this order.

Dated at Topeka, Kansas, this 24th day of May, 1956.

Roy N. McCue,
Ira C. Watson,
John L. MacNair,
Commissioners.

(Seal)

Attest:
L. I. Crater,
Secretary

CUSTOM BUILT HOMES CO., INC.,
Appellant,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Appellee.

Journal Entry of Kansas District Court.

Now on this 28th day of May, 1957, a regular trial day of the May, 1957, term of the above entitled court, this matter comes on for trial. The appellant appears in person and by its attorneys, Charles W. Hess and John Breyfogle; the appellee appears in person and by its attorneys, Michael A. Barbara and Dean Burkhead.

Thereupon the parties announce themselves ready for trial before the court without a jury.

Thereupon opening statements are made, and counsel for the parties request the court that Memorandum Briefs and suggested Findings of Facts and Conclusions of Law be filed by the parties herein at the conclusion of the trial. The court approves said request.

Thereupon the appellant introduces its evidence and rests. The appellee then moves for a directed verdict. The court takes said motion under advisement. Thereupon the appellee offers no evidence on its behalf and rests.

Now on this 3rd day of October, 1957, the court, after examining the Briefs and suggested Findings filed by the parties herein and consideration of the evidence herein, makes the following Findings of Facts and Conclusions of Law:

Findings of Facts.

1. That under the proposal agreement and contract between Page & Hill and Custom Built Homes, the prefabricated house units were to be furnished and delivered by Page & Hill, "FOB building site in Wyandotte County, Kansas."

2. That under said agreement and contract, and the evidence, the title to the prefabricated exterior and interior sections handled in the unloading process by the Page & Hill crane passed from Page & Hill to Custom Built Homes at the instant the hooks of said crane were disconnected from said sections. At that time said sections had become temporarily affixed to the foundation platform by means of from one to three nails having been applied by employees of Custom Built Homes. That the unloading of said prefabricated exterior and interior sections was done by means of a crane operated by the driver of the Page & Hill truck with the assistance of employees of Custom Built Homes.

3. That the prefabricated roof and ceiling sections were unloaded manually by Custom Built Homes' employees onto a Custom Built Homes' truck, then placed in front and back of the house being constructed, and later installed manually after the exterior and interior panels were in place and fastened together. That under the proposal and agreement and as shown by the evidence, title to the prefabricated roof and ceiling sections passed from Page & Hill to Custom Built Homes at the time said sections were unloaded onto the Custom Built Homes' truck by its employees.

4. That certain loose items such as trim, roof shingles, etc. were unloaded manually by Custom Built Homes' employees and the same were stored in or about the premises

until used. That the title to these loose items passed from Page & Hill to Custom Built Homes at the time they were unloaded from the Page & Hill Truck by the Custom Built Homes' employees.

5. That as shown by the evidence, Page & Hill did assume liability on occasion for damage to panels in the unloading of the same by its crane; however, under the contract between the parties it was provided, "If shipment is by transportation owned or operated by Manufacturer (Page & Hill), Manufacturer assumes the responsibility for loss or damage incurred in shipment."

6. That at the time the title, possession and control of the various prefabricated sections and materials as set forth in findings numbered 2, 3, and 4 above, passed from Page & Hill to Custom Built Homes, said sections and materials constituted tangible personal property. That immediately subsequent thereto, said sections and materials, while under the possession, control and ownership of Custom Built Homes, were assembled by employees of Custom Built Homes into a completed house, and as a result thereof, said items of tangible personal property became realty. That the activities of the employees of Custom Built Homes as heretofore outlined in these findings constituted the using and consumption of tangible personal property.

7. That the houses so constructed were sold by Custom Built Homes under contract with various purchasers, most of said contracts having been executed prior to the construction of the houses.

Conclusions of Law.

1. That Custom Built Homes did use and consume in the State of Kansas tangible personal property purchased from a vendor without the State of Kansas, all

within the meaning of the statutes of the State of Kansas and the regulations of the Kansas State Commission of Revenue and Taxation.

2. That Custom Built Homes is the final consumer as defined in G.S. 1949, 79-3602 (M) as amended.

3. That the order made by the Commission of Revenue and Taxation of the State of Kansas is valid and not repugnant to the Constitution of the United States or the laws of the State of Kansas.

4. That the taxpayer, Custom Built Homes Co., Inc., is legally liable to pay the compensating tax and the interest thereon upon the tax based in the amount of $22,133.57 for the taxable period from October 1, 1950, to September 30, 1955, with interest thereon in the amount of $1,257.33, plus further interest at one per cent per month from June 24, 1956, until paid, on the assessment made herein. That the assessment made by the Director of Revenue is sustained in the aforesaid amount and the appellee, Kansas State Commission of Revenue and Taxation should have judgment therefor against Custom Built Homes Co., Inc., and for costs.

Earl E. O'Connor,
Judge, Division 1, Johnson County, Kansas.

Approved by:
Charles W. Hess,
John Breyfogle,
Attorneys for Appellant.
(s) Michael A. Barbara,
Attorney for Appellee.

No. 41,125.

CUSTOM BUILT HOMES CO., INC.,
Appellant,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Appellee.

Opinion of Kansas Supreme Court.

Appeal from Johnson district court, division No. 1; EARL E. O'CONNOR, judge. Opinion filed January 24, 1959. Affirmed.

The opinion of the court was delivered by

SCHROEDER, J.: The State Commission of Revenue and Taxation of the State of Kansas sustained an assessment for Compensating Tax made by the Director of Revenue based upon the use, storage or consumption of tangible personal property within the State of Kansas pursuant to G. S. 1949, 79-3703, as amended, against Custom Built Homes Co., Inc., appellant. The District Court of Johnson County upon appeal affirmed the order of the Tax Commission and the appellant has duly perfected its appeal to this court.

The question presented is whether under a sales contract the appellant used, stored or consumed prefabricated house sections as *tangible personal property* within the State of Kansas after said sections had ceased to be a part of interstate commerce and prior to their becoming affixed as real estate within the state.

The decision is controlled by a determination of *when title passed* to the property which is the subject of the sales contract.

Custom Built Homes Co., Inc., hereafter called appellant, is a Kansas corporation having its principal place of business in Johnson County, Kansas. During the period in question, from October 1, 1951, to September 30, 1955, the appellant was engaged in the business of home development and the sale of prefabricated houses in the Stony Point Heights Addition in Wyandotte County, Kansas.

Appellant entered into a contract to purchase prefabricated houses from Page & Hill Homes, Inc., a Minnesota corporation, hereafter called Page-Hill. Under the contract Page-Hill was "to furnish and deliver *F.O.B. building site in Wyandotte County, Kansas,* one hundred Ninety" (Emphasis added) prefabricated house units at the prices and under the terms and conditions specified. Among the provisions of the contract are the following:

> "3. Terms of payment shall be in accordance with Agreement to Pay form attached to be executed by both the lender furnishing construction money and your company [Custom Built Homes Co., Inc.].
>
> "4. Delivery schedule shall be furnished by you showing house model, elevation, asbestos siding and roof shingle colors thirty days in advance of requested delivery dates. Each schedule shall provide for not less than 15 house units with the exception of your initial order covering house units to be used for demonstration and sales promotion.
>
> "5. The prices as listed above are based on the quantity covered by this order and your acceptance of deliveries to start on or about December 1, 1953 and be completed and accepted by you on or before December 31, 1954. It is recognized that house units covered by this order are to be geared to your sales and in order for us to properly control our production schedule it is agreed that you will keep us advised each week as to the number and model of houses sold."

(The record does not disclose whether the "Agreement to Pay form" was introduced in evidence and the parties have not seen fit to present anything in the record concerning the time or manner of payment.)

Under the terms of the contract, Page-Hill delivered from its factory in Minnesota the prefabricated sections to the building site. Delivery was made by Page-Hill trucks operated by Page-Hill drivers. The complete and prefabricated wall and partition sections included the exterior trim, siding, building paper, sheeting, studs, foil insulation, sheet rock, interior trim, windows and frames, doors, door frames and hardware already attached. The interior partitions were also complete and prefabricated in the same complete manner. The ceiling sections were complete and prefabricated with the trim already in place. The roof sections were prefabricated containing joists and insulation.

In its development of Stony Point Heights Addition appellant purchased the lots and erected such foundations as were necessary and constructed thereon a platform constituting the floor joists and the subflooring from raw materials upon which the Kansas sales tax was paid. The complete house, disassembled, came with the truck, excluding deck material, oak floors, nails, furnace and wiring. These were all purchased locally and installed by the appellant through its subcontractors or laborers.

As a part of the financing of the construction in Stony Point Heights Addition Page-Hill took a blanket mortgage on the lots to which the prefabricated houses were attached.

Appellant employed five carpenters and two laborers. When the Page-Hill truck arrived at the Stony Point Heights Addition in Wyandotte County, the driver was directed by an employee of the appellant to a specific house foundation—the building site. The truck proceeded

to the building site and usually parked on the street immediately in front of the foundation. The truck was then unloaded in the following manner: The Page-Hill driver unhooked his tractor from the semi-trailer and installed a boom on his tractor. He would "unbutton" the canvas covering the semi-trailer, sometimes with assistance from appellant's employees, and then back up his tractor to the semi-trailer and hook on to a section of panel which would be approximately twenty-four feet long. These panels were loaded on the semi-trailer in proper sequence for assembly on the foundation at the time of unloading. Appellant's employees, the laborers, would steady the panels hanging from the boom on the tractor, one on each side, as the driver would carry the section by means of the crane to the foundation. The panel, held by the crane, would be placed on the foundation guided by the laborers. Appellant's carpenters would then nail down the panel, applying from one to three nails. *One of the carpenters would climb up the panel and release the hook of the crane.* Appellant's carpenters would steady the panel until the next section was installed and hooked on to the one previously unloaded. This process was used for all sections, interior and exterior, except the roof and ceiling sections. The roof and ceiling sections were unloaded by appellant's employees, placed in the appellant's truck and installed manually by appellant's employees. All the labor and carpenter work was done by appellant's employees while the house was under construction, except such work as wos done by appellant's subcontractors. The Page-Hill driver drove the tractor and remained in the cab where he operated the power take-off which controlled the crane. Loose items loaded on the semi-trailer between the panels and in boxes assembled under the platform of the trailer were unloaded by appellant's employees and placed either in

the house or near the foundation. These included such items as shingles, felt and trim.

In most instances appellant had a contract with the purchaser of a house before the house was constructed.

Except as hereafter indicated, the findings of the trial court are consistent with the foregoing statement of facts. The facts stated were established by *stipulation* with supplementation from the evidence. The few particulars in which there is variance in the record concerning the evidence are deemed immaterial to a decision herein but will be indicated in disposing of appellant's arguments. The parties stipulated the amount of tax plus interest due and owing by the appellant if the order of the Tax Commission is sustained in its entirety.

Pertinent to the issues herein, the trial court after finding that Page-Hill was to furnish and deliver prefabricated house units *F.O.B. building site in Wyandotte County, Kansas*, further found under its heading denominated "Findings of Fact" the following:

> "2. That under said agreement and contract and the evidence, the *title* to the prefabricated exterior and interior sections handled in the unloading process by the Page & Hill crane *passed* from Page & Hill to Custom Built Homes at *the instant the hooks of said crane were disconnected from said sections*. At that time said sections had become *temporarily* affixed to the foundation platform by means of from one to three nails having been applied by employees of Custom Built Homes * * *." (Emphasis added.)

Under the same heading it also found that title to the prefabricated roof and ceiling sections and to the loose items passed from Page-Hill to appellant *at the time they were unloaded from the semi-trailer* by appellant's employees.

The trial court found that Page-Hill "did assume liability on occasion for damage to panels in the unloading of the same by its crane; however, under the contract between the parties it was provided, 'If shipment is by transportation owned or operated by Manufacturer (Page & Hill), Manufacturer assumes the responsibility for loss or damage incurred in shipment.' " (This portion of the written contract does not appear in the record as abstracted.)

The trial court concluded that at the time the title, possession and control of the various prefabricated sections and materials passed from Page-Hill to appellant, said sections and materials constituted *tangible personal property* purchased from a vendor without the State of Kansas, all within the meaning of the statutes of the State of Kansas and the regulations of the Kansas State Commission of Revenue and Taxation and affirmed the order made by the Tax Commission. (G. S. 1949, 79-3602[m]; 79-3702[b] and [c]; 79-3703; 79-3703a; 79-3704[d]; 79-3705a; and amendments to the foregoing statutes where applicable.)

When did title pass? The parties recognize this to be the determinative question in this lawsuit.

Appellant seizes upon the finding of the trial court that title to the prefabricated exterior and interior sections passed to the appellant at the time the hooks of the Page-Hill crane were removed from such sections. It is then argued that the trial court erred in finding that such sections were *temporarily* affixed to the real estate since the evidence is undisputed that the sections were nailed to the foundation at the time the hooks were removed and had thus become permanently affixed to and had become a part of the real estate prior to the passing of title to the appellant.

Further argument by the appellant inferentially proceeds on the theory that title to a prefabricated house unit

cannot pass in parts at different times, but of necessity under the contract must pass *in toto* at a specific time in accordance with the intention of the parties. Appellant argues that title to the prefabricated roof and ceiling sections did not pass until such sections had become permanently affixed to and had become a part of the real estate. This is based upon testimony that initially these sections were unloaded by a separate stationary crane furnished by Page-Hill in much the same fashion as the exterior and interior wall panels. This method was discarded after the first few houses were constructed at Stony Point Heights Addition.

Appellant also contends that the trial court erred as to the time title passed to the loose materials since it failed to amplify such finding by stating what percentage these loose items bore to the entire unit, and further in failing to make a finding as to the time title to all of these units of a prefabricated house as a whole was contemplated to pass from Page-Hill to the appellant under the sales contract.

The general rule of law upon which appellant relies is stated in *Kennedy* v. *Glen Cove Mut. Ins. Co.*, 154 Kan. 327, 118 P.2d 591, which held:

> "In a sale of personal property the fundamental rule of construction to be applied, in determining whether title had passed, is the intent of the parties.
>
> "When uncertainty results from language employed in a written or oral contract of sale, courts, in order to determine the intent of the parties, may consider legitimate circumstances surrounding the sale, including the acts and conduct of the parties and the construction placed upon the contract by the parties themselves." (Syl. § § 1 and 2.)

In actions founded upon written instruments, where the rights of parties relative to the terms thereof are in controversy, certain fundamental legal concepts permeate the law, and with minor variations it matters not whether the instrument be a contract, a deed or a will.

The doctrine has been well established and frequently applied that where parties have carried on negotiations, and have subsequently entered into an agreement in writing with respect to the subject matter covered by such negotiations, the written agreement constitutes the contract beween them and determines their rights. (*Arensman* v. *Kitch*, 160 Kan. 783, 789, 165 P.2d 441; *Hudson* v. *Riley*, 104 Kan. 534, 539, 180 Pac. 198; *Hudson State Bank* v. *Haile*, 130 Kan. 322, 286 Pac. 228; *Grantham* v. *Hanenkratt Lead & Zinc Co.*, 131 Kan. 535, 542, 292 Pac. 757; *Continental Supply Co.* v. *Morgan*, 133 Kan. 121, 123, 298 Pac. 790; and *McKay* v. *Clark*, 162 Kan. 653, 659, 178 P.2d 679.)

It is a judicial function to *interpret* a written contract which is free from ambiguity and does not require oral testimony to determine its meaning. Ambiguity in a written instrument does not appear until the application of pertinent rules of *interpretation* to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning. (*Klema* v. *Soukup*, 175 Kan. 775, 267 P.2d 501.) If a written contract is actually ambiguous concerning a specific matter in the agreement, facts and circumstances existing prior to and contemporaneously with its execution are competent to clarify the intent and purpose of the contract in that regard but not for the purpose of varying and nullifying its clear and positive provisions. (*Maltby* v. *Sumner*, 169 Kan. 417, 219 P.2d 395; and *Oliver* v. *Nugen*, 180 Kan. 823, 308 P.2d 132.)

In *Johnston* v. *Gibson*, 184 Kan. , P.2d , the rules concerning a will have been summarized. See, also, *Brewster* v. *Schammerhorn*, 183 Kan. 739, 332 P.2d 526, relevant to the rules of construction where a deed is ambiguous.

Thus, where a court, either trial or appellate, is called upon to determine the intention of the parties to a written sales contract, its first duty is to survey the instrument in its entirety and apply pertinent rules of interpretation. On the issue presently before the court it was unnecessary to resort to rules of construction calling for extrinsic evidence, unless application of pertinent rules of interpretation to the face of the instrument left it genuinely uncertain as to when the parties intended title to pass to the buyer.

The initial letters, "F.O.B." frequently found in contracts for goods to be shipped stand for the words "free on board." In commercial practice these words have a well-defined meaning, and, as applied to the sale of merchandise destined for shipment, mean that such goods are to be put into the hands of the carrier at the point of shipment free of expense to the buyer. Unless something further appears, therefore, the mere presence of an unadorned F.O.B. provision does not affect the question of when the property interest in the goods passes to the buyer, there being already available without these words the presumption that on delivery of goods to a carrier for transportation to the buyer pursuant to the contract the property interest is intended to pass to the buyer.

It is equally well settled, that if the parties contract in terms providing for shipment F.O.B. destination, the seller assumes the payment of freight and the transportation is for his account, with the ordinary presumption therefrom that the property interest in the goods is not

intended to pass until the goods reach the destination indicated. Such cases fall within Section 19, Rule 5, of the Uniform Sales Act, which reads:

> "Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." (1 U. L. A., Sales, § 19, p. 10.)

Although the State of Kansas has not seen fit to adopt the Uniform Sales Act, this particular section is merely declaratory of the common law (1 U. L. A., Sales, § 19, Note 241, p. 355) and as such has been adopted in Kansas. (*Brewing Association* v. *Nipp*, [1897] 6 Kan. App. 730, 50 Pac. 956, 101 A.L.R. 297; and *Hunter* v. *Kramer*, 71 Kan. 468, 80 Pac. 963.)

In the *Hunter* case four carloads of bran were sold by a seller in Wellington, Kansas, to a buyer in St. Louis, Missouri. The contract called for shipment "F.O.B. St. Louis." The court there said:

> "* * * Some of the courts have accepted proof as to the meaning of the letters [F.O.B.] when used by parties in a business contract, while others have deemed them to be in such general use in contracts of sale, and so well understood, that their meaning is a matter of common knowledge, of which the courts must take notice. *We are inclined to the view that in contracts of this character judicial knowledge may be taken of these characters, and that parol evidence is ordinarily not needed in their interpretation.* If outside proof, however, was necessary, it appears that the court in one instance overruled an objection to this class of testimony, and allowed the interpretation given by the witness to stand. That interpretation conforms to the one that is generally understood in

> the business world, and that is 'free on board,' and as used in this contract would signify free on board the cars at East St. Louis." (Emphasis added.) (p. 472.)

The *Hunter* case was cited with approval and quoted as late as 1953 in *State of Oklahoma ex rel.* v. *H. D. Lee Co.*, 174 Kan. 114, 254 P.2d 291. There invoices stated the sales were "F.O.B. Tulsa," and it was held transfer of title occurred at Tulsa where physical delivery and transfer of possession were had. The court quoted 46 Am. Jur., Sales, § 442, with approval stating the general rule as follows:

> "'Where the contract provides for a sale f.o.b. the point of destination, the title is generally held not to pass, in the absence of a contrary intention between the parties, until the goods have been delivered at the point designated.'" (p. 119.)

See, also, *Wing* v. *Mid-Continent Seeds*, 170 Kan. 242, 225 P.2d 78; and *Hurst* v. *Manufacturing Co.*, 73 Kan. 422, 85 Pac. 551, for other Kansas cases dealing with F.O.B. sales.

The case of *Wing* v. *Mid-Continent Seeds, supra*, should not be confused with the rules heretofore stated. There a grower of certified atlas seed sold 400 bags of Atlas Sargo to the defendant. The confirmation of the sale on the defendant's (buyer's) *captioned form, signed by defendant's manager*, had blanks filled in showing "date of purchase to be '1-19-49' when ship 'Middle of Feb., 1949'" and that defendant had purchased of plaintiff "F.O.B. Farm" the described seed. *The contract of sale was put in issue by the pleadings, defendant claiming the alleged written contract set forth in the petition to be incomplete.* On March 20, 1949, the seed without fault of the plaintiff was destroyed by fire while it was still on plaintiff's farm. The court

held that risk of loss followed the title and that upon all the evidence it was a question for the jury to determine when the parties intended title to pass.

In our opinion "F.O.B. building site in Wyandotte County, Kansas," has a clear and unambiguous meaning. Applied to the facts in this case as to each prefabricated house unit under the contract it means free on board the semi-trailer at the building site in Stony Point Heights Addition, Wyandotte County, Kansas. No contrary intention between the parties to the sales contract appearing from the face of the instrument, title to the merchandise passed upon delivery, to the appellant (buyer) free on board the semi-trailer at the building site in Wyandotte County, Kansas.

The time at which merchandise comes to the end of its interstate journey need not coincide with the time at which title to merchandise under a sales contract passes to the buyer. While it was proper to show by evidence that the "use" tax was not imposed upon the operations of the interstate commerce but upon the privilege of use after interstate commerce had ceased, extrinsic evidence to determine when title to the merchandise was contemplated by the parties to pass under the contract was immaterial. Presumably counsel for the appellee was misled upon the theory that the sales contract was ambiguous as to this point.

Assuming it can be successfully argued that appellee is bound by the theory upon which the case was presented in the trial court (*Oliver* v. *Nugen*, *supra*), appellant claiming an exemption from the Compensating Tax must bring itself clearly within the exemption provisions of the applicable statute (*Warren* v. *Fink*, 146 Kan. 716, 72 P.2d 968), or overcome the statutory presumption that

sale of the merchandise by Page-Hill for delivery in Kansas was sold for *use* in Kansas. (*Consumers Co-operative Ass'n* v. *State Comm. of Rev. & Taxation*, 174 Kan. 461, 256 P.2d 850; and G.S. 1949, 79-3703a.)

Reference in further discussion will be made only to the General Statutes of 1949, amendments since having been made which are applicable to the various periods of time covered by the order of the Tax Commission being immaterial for our purposes—see G.S., 1957 Supp.

The provisions of G.S. 1949, 79-3703, levy a tax in the amount of 2% of the purchase price for the privilege of using, storing or consuming within the State of Kansas any article of tangible personal property.

For the purpose of administering the act to prevent evasion, evidence that tangible personal property was sold by any person for delivery in the State of Kansas is *prima facie* evidence that such tangible personal property was sold for use in Kansas. (G.S. 1949, 79-3703a; and see, *Consumers Co-operative Ass'n* v. *State Comm. of Rev. & Taxation*, *supra*.)

The word "use" means and includes the exercise within this state by any person of any right or power over tangible personal property incident to its ownership of that property. (G.S. 1949, 79-3702[c].)

Under G.S. 1949, 79-3705a, the consumer or user is required to pay the tax.

Exemptions from the tax are provided in G.S. 1949, 79-3704. The pertinent portions read:

"The provisions of this act shall not apply:

* * *

"(c) In respect to the use, storage or consumption of any article of tangible personal property the

sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this act whether under the laws of that [this] state or of some other state of the United States;

"(d) In respect to the use, storage or consumption of any article of tangible personal property brought into or used within the state of Kansas if such article of tangible personal property would not have been subject to tax under the provisions of the retailer's sales tax act of this state if purchased within this state;"

The Kansas Retailers' Sales Tax Act, G.S. 1949, 79-3601, *et seq.*, and the Kansas Compensating Tax Act, G.S. 1949, 79-3701, *et seq.*, while separate acts, are complementary and supplemental to one another and are generally construed together. (*Consumers Co-operative Ass'n* v. *State Comm. of Rev. & Taxation, supra;* and see, G.S. 1949, 79-3702[b].) The provisions of G.S. 1949, 79-3602(m), are therefore material in construing the Kansas Compensating Tax Act. They provide that sales to all contractors of tangible personal property, materials and supplies, for use by them in erecting structures for others, or building on, or otherwise improving, altering or repairing real property of others are sales for final consumption.

Further elaboration upon statutes relating to the Kansas sales tax and the Kansas compensating tax, commonly referred to as the "use" tax, is unnecessary. In *General Motors Corporation* v. *State Comm. of Rev. & Taxation*, 182 Kan. 237, 320 P.2d 807, certiorari denied U. S. , 79 S. Ct. 115, 3 L. Ed. 2d 105, statutes have been quoted and the purpose and scope of the two acts have been beautifully summarized. Reliance is placed upon the foregoing case by the appellant under its theory of the law and the facts in the case presently before the court. In our opinion the decision in the *General Motors* case has no

application to the facts here. There the property involved was owned by the Federal government, and the court held the corporation's *use* of the property was *not incidental to its ownership* thereof and, therefore, did not subject the corporation to payment of the "use" tax.

There is absolutely *no evidence* in the abstract or counter abstract to indicate that the tangible personal property in question has been subjected to a tax for its sale or use by the State of Kansas, the State of Minnesota, or any other state, except the subject tax of this litigation.

The following appears in appellant's brief:

> "Appellant wishes to make clear from the outset that it is not here arguing whether or not a use or sales tax is due and payable from Page and Hill Homes, Inc. Appellant is concerned only with whether or not the State of Kansas has any basis whatsoever for assessing a compensating use tax against appellant under the circumstances involved herein * * *."

Appellant seeks by a construction of the statutes to avoid liability, citing *Equitable Life Assurance Society* v. *Hobbs*, 155 Kan. 534, 127 P.2d 477; and *Equitable Life Assurance Society* v. *Hobbs*, 154 Kan. 1, 114 P.2d 871. This argument is premised upon two propositions: (1) That a tax designed for tangible personal property cannot be assessed on real estate; and (2) that appellant cannot be assessed a tax for personal property until such time as appellant owns such property while it occupies a status of tangible personal property.

It is noted that no witness associated with Page-Hill testified in the trial court. Appellant's president testified that a deciding factor in making the purchase of Page-Hill homes was the fact that Page-Hill, as a part of its contract, would place the sections of the prefabricated house shipped

on appellant's foundation. He further testified that Page-Hill not only had a blanket mortgage on all of Stony Point Heights Addition, which was covered by its contract, but had as additional security a mortgage on some 200 lots in Stony Point South, another adjoining subdivision owned by the appellant.

Appellant argues that if title were permitted by Page-Hill to pass prior to the time the prefabricated parts of the house were affixed to the realty, it would have completely defeated the whole security system which Page-Hill employed on this project. It is contended that intervening liens of subcontractors would attach. The thread of evidence upon which appellant clings for this argument is that Page-Hill would occasionally assume liability for damage to panels in the unloading of the same by its crane as found by the trial court. This could also be construed, under the evidence, as an admission of negligence by Page-Hill in causing the damage. In our opinion this argument has no merit. In fact, the additional security of a mortgage given Page-Hill on the adjoining subdivision, upon which none of the prefabricated house units covered by the contract were to be construed, indicates that Page-Hill was not relying on retention of title until the prefabricated parts became affixed as realty. The property was not consigned to Page-Hill in Wyandotte County, Kansas; it was consigned to the appellant.

While the record, as abstracted, is confusing as to just what evidence the trial court had before it, noting some of appellant's arguments, we cannot escape the simple proposition that the trial court with all the evidence before it made findings of fact.

Insofar as we are presently concerned, the important factor to be considered is when the parties to the written

sales contract intended the property interest in the merchandise to pass to the appellant. The trial court's *findings*, which are amply supported by competent and substantial evidence, are conclusive on the question and binding on this court under the familiar rule of appellate review. (*Safford* v. *Tibbetts*, 104 Kan. 224, 178 Pac. 618; and *General Motors Corporation* v. *State Comm. of Rev. & Taxation*, *supra*.)

The trial court specifically found upon evidence before it that Page-Hill was to furnish and *deliver prefabricated house units "F.O.B. building site in Wyandotte County, Kansas."* Its further so-called finding, that title to the prefabricated exterior and interior sections passed from Page-Hill to appellant at the instant the hooks of the crane were disconnected from the sections, is a mere conclusion which is not supported by its previous finding of fact. It is also inconsistent with its further conclusion that title to the prefabricated roof and ceiling sections and to the loose items passed at the time they were unloaded from the semi-trailer by appellant's employees. Obviously, title to all of the unassembled parts of a prefabricated house delivered as a unit was required to pass at one time under the contract.

The proper conclusion to be drawn from the trial court's finding has heretofore been stated. As to each prefabricated house unit under the contract title passed upon delivery to the appellant—the time at which the tractor was unhooked from the semi-trailer loaded with the merchandise parked at the building site. On the issues here this is practically equivalent to the trial court's conclusion that title to portions of the merchandise passed when it was unloaded from the semi-trailer. The ultimate conclusion of the trial court that the merchandise occupied the status of tangible personal property at the

time title passed to the appellant resulted in a correct decision.

A correct decision for which an erroneous reason is given by the trial court is not ground for reversal. (*La Harpe Farmers Union* v. *United States F. & G. Co.*, 134 Kan. 826, 8 P.2d 354.) It matters not that some of the reasons given by the trial court in arriving at its general conclusion may have been erroneous. Where the judgment rendered by the trial court is supported by the facts in the case, and must necessarily have been rendered under the law on the facts presented, it will not be reversed because the court adopted a wrong theory of the law, and based its judgment on such erroneous theory. (*Binder* v. *Local Union No. 685*, 181 Kan. 799, 317 P.2d 371.)

One further argument deserves attention. The appellant contends that the interstate journey of the merchandise herein continued until the goods became realty and as a result there was no taxable event upon which the compensating or "use" tax could apply. The appellant cites *B. & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433, decided under the *Federal Employers' Liability Act*, which held that the loading or unloading of an interstate shipment *by the employees of a carrier* was so closely related to the interstate transportation as to be *practically* a part of it. Other cases cited by the appellant were decided under the *Fair Labor Standards Act*. (*Clyde* v. *Broderick*, [1944, C.C.A. 10] 144 F.2d 348; and *Jax Beer Co.* v. *Redfern*, [1941, C.C.A. 5] 124 F.2d 172.)

On the facts in the instant case the unloading of ceiling and roof sections and all loose items was done *by appellant's employees*, and even the exterior and interior sections which were handled by the crane *were also controlled, manipulated and affixed by appellant's employees.*

We have no hesitance in declaring that at some point after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property and as such was used, stored or consumed by the appellant within the contemplation of the Kansas Compensating Tax Act prior to its becoming affixed as real property. The fact cannot be overcome that appellant's employees performed all the labor in constructing the house except for subcontractors working under the appellant. A contrary conclusion would be equivalent to holding that Page-Hill constructed the house, and this would be inconsistent with the evidence before the court.

The imposition of a "use" tax by Kansas is not violative of the interstate commerce clause of the Federal constitution merely because the merchandise was transported to Kansas from the State of Minnesota. When merchandise transported in interstate commerce has arrived at its destination and is there held for use or disposal, it passes under the protection of state law and becomes subject to the taxing and police power of the state. (*State of Oklahoma ex rel.* v. *H. D. Lee Co.*, 174 Kan. 114, 254 P.2d 291; and see, also, *Montgomery Ward & Co.* v. *Commission of Revenue and Taxation*, 156 Kan. 408, 133 P.2d 1008.)

The United States Supreme Court had a general use or compensating tax case before it in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814. There a use tax imposed by the State of Washington was sustained, the court holding the tax was not upon the operations of the interstate commerce but upon the privilege of use after interstate commerce had ceased. A situation appropriate to the facts in this case was there presented. The following is quoted from the opinion of Justice Cardozo:

"The case before us does not call for approval or disapproval of the definition of use or enjoyment in

the rules of the Commission. Those rules inform us that 'property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term "made available for use" means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.' A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself. If the rules are too drastic in that respect or others, the defect is unimportant in relation to this case. Here the machinery and other chattels subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own." (p. 583.)

In *Southern Pac. Co. v. Gallagher*, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, the United States Supreme Court held tangible personal property purchased outside California by an interstate railroad corporation for immediate or subsequent use in an interstate railway facility was subject to the California use tax. The court there said:

"* * * If articles so handled are deemed to have reached the end of their interstate transit upon 'use or storage,' no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of

ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun * * *." (p. 177).

A similar rule as to state taxes levied upon sales of personal property, including the reasons therefor, has been stated in *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876.

In *United States* v. *City of Detroit*, 355 U.S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424, 460, a Michigan statute, providing that when tax-exempt real property is used by a private party in a business conducted for profit the private party is subject to taxation to the same extent as though he owned the property, was upheld. (See, also, *U. S.* v. *Township of Muskegon*, 355 U.S. 484, 78 S. Ct. 483, 2 L. Ed. 2d 436, 460; and *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 78 S. Ct. 458, 2 L. Ed. 2d 441, 460.)

In conclusion we hold that the merchandise delivered by Page-Hill under the written sales contract was tangible personal property purchased from a vendor without the State of Kansas, for use, storage or consumption within the State of Kansas, for which the Compensating Tax was properly assessed against the appellant and the Order of the Tax Commission was correct.

The judgment of the trial court affirming the Order of the Tax Commission is affirmed.

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SUPREME COURT, STATE OF KANSAS

JANUARY SESSION

JANUARY TERM, 1959

TOPEKA, SATURDAY, JANUARY 24, 1959

CASE No. 41,125.

CUSTOM BUILT HOMES CO., INC.,
Appellant,

vs.

THE KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Appellee.

Journal Entry of Kansas Supreme Court.

This cause comes on for decision and thereupon, after due consideration by this court, It Is Ordered and Adjudged that the judgment of the Court below be affirmed.

It Is Further Ordered that the appellant pay the costs of this case in this Court and hereof let execution issue.

Schroeder, J., delivered the Opinion of the Court, all of the Judges concurring.

IN THE SUPREME COURT OF THE STATE OF KANSAS

Topeka, Wednesday, March 11, 1959.

No. 41,125.

CUSTOM BUILT HOMES CO., INC.,
a Kansas Corporation,
Appellant,

vs.

KANSAS STATE COMMISSION OF
REVENUE AND TAXATION,
Appellee.

Order Denying Motion for Rehearing.

Now comes on for decision the motion of the appellant for a rehearing of this cause and thereupon, after due consideration by the court, it is ordered that said motion be denied.

FILE COPY

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JUL 2 1959
JAMES R. BROWNING, Clerk

No. [redacted] 96

In the Supreme Court of the United States

OCTOBER TERM, 1958

CUSTOM BUILT HOMES CO., INC., *Petitioner,*

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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27-9404

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In the Supreme Court of the United States

OCTOBER TERM, 1958

CUSTOM BUILT HOMES CO., INC., *Petitioner,*

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION, *Respondent.*

No. 980

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The trial court, District Court of Johnson County, Kansas, wrote no opinion. Its findings of fact and conclusions of law are not reported but appear at pages 21-25 in the abstract filed with the Supreme Court of Kansas. The opinion of the Supreme Court of Kansas affirming the judgment of the District Court of Johnson County, Kansas, is reported in 184 Kan. 31, 334 P. 2d 808 (1959) (pet. app. A-8-28).

JURISDICTION

The opinion of the Supreme Court of Kansas affirming the judgment of the trial court was filed January 24, 1959. The petitioner, Custom Built Homes Co., Inc., filed a motion for rehearing which was denied by the Supreme Court of Kansas on March 11, 1959. The petition for a writ of certiorari was filed with this court on June 6, 1959. The jurisdiction of this court is invoked under 28 USC, section 12, 1957 (3).

QUESTION PRESENTED

Whether the state of Kansas is prohibited by the commerce clause of the United States Constitution from collecting compensating (use) tax upon the use of tangible personal property by the petitioner who, as contractor, accepted delivery and affixed prefabricated sections of houses to real estate located in the state of Kansas?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the commerce clause, article 1, section 8, clause 3, Constitution of the United States:

> "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

STATUTES INVOLVED

G. S. Kan., 1949:

"79-3602 (*m*) . . . For purposes of this act, sales of tangible personal property to all contractors, subcontractors or repairmen of materials and supplies for use by them in erecting structures for others, or building on, or otherwise improving, altering, or repairing real property of others are sales for final consumption.

"79-3702 (*b*) The meaning ascribed to words and phrases in section 79-3602 of the General Statutes Supplement of 1943, insofar as is practicable, shall be applicable herein unless otherwise provided. The provisions of sections 79-3601 to 79-3625 of the General Statutes Supplement of 1943 and amendments thereto, both sections inclusive, relating to enforcement, collection and administration, insofar as practicable, shall have full force and effect with respect to taxes imposed under the provisions of this act.

"(*c*) The word 'use' means and includes the exercise within this state by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of the property in the regular course of business, and except storage as hereinafter defined.

"79-3703. *Tax or excise imposed; rate.* There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using, storing, or consuming within this state any article of tangible personal property purchased subsequent to June 30, 1945. Such tax shall be levied and collected in an amount equal to the purchase price paid by the taxpayer multiplied by

the rate of two percent. All transactions involving compensating tax or use tax prior to July 1, 1945, shall be administered under the law as it exists prior to that date.

"79-3703a. *Evidence that property was sold for use in state.* For the purpose of the proper administration of this act and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

"79-3704. *Exemptions.* The provisions of the act shall not apply: . . . '(*d*) In respect to the use, storage or consumption of any article of tangible personal property brought into or used within the state of Kansas if such article of tangible personal property would not have been subject to tax under the provisions of the retailers' sales tax act of this state if purchased within this state:'

"79-3705a. *Tax paid by consumer or user; duty of retailers; returns.* The tax levied hereunder shall be paid by the consumer or user to the retailer and it shall be the duty of each and every retailer to collect from the consumer or user, the full amount of the tax imposed by this act, and such tax shall be a debt from the consumer or user to the retailer when so added to the original purchase price, and shall be recoverable at law in the same manner as other debts: *Provided, however,* If the tax levied under section 2 (79-3703) of this act is not collected or collectible by the retailer, then the person using, consuming or storing tangible personal property in this state shall file a return and pay the tax, as required by section 10 (79-3706) of this act."

Regulations Involved

"94-7-1. . . . *Purpose of the act.* The compensating (use) tax act, as amended, supplements the Kansas retailers' sales tax act by imposing a like tax for the privilege of using, storing or consuming within this state tangible personal property purchased at retail, and in respect to which property neither a sales tax nor a use tax of two percent or more has been imposed by this state or any other state.

"94-7-4. . . . *The taxable event.* The tax is imposed upon the privilege of using, storing, or consuming within this state any article of tangible personal property purchased subsequent to June 30, 1945. When such property is used, stored, or consumed in Kansas, such use, storage, or consumption in Kansas is the taxable event.

"94-7-7 (*b*). . . . . Delivery is held to have taken place in this state (1) when physical possession of tangible personal property is actually transferred to the buyer within this state. . . .

"94-7-11. *Purchases other than at retail.* The test of a retail purchase is the purpose for which the purchase is made. Purchases for final use, storage, or consumption are retail purchases as distinguished from purchases for resale. The status of the seller is not a controlling factor; purchases at retail may be made from . . . . manufacturers, ... the important consideration is whether the purchase is made for final use, storage or consumption."

STATEMENT

In this suit for Kansas use taxes, the pertinent facts may be summarized as follows:

Custom Built Homes Co., Inc., hereafter called petitioner, is a Kansas corporation having its principal place of business in Johnson County, Kansas. During the period in question from October 1, 1951, to September 30, 1955, the petitioner was engaged in the business of home development and sale of prefabricated homes in Stony Point Heights Addition, Wyandotte County, Kansas.

Petitioner entered into a contract to purchase prefabricated houses from Page and Hill Homes, Inc., a Minnesota corporation, hereafter called Page-Hill. Under the contract, Page-Hill was to furnish and deliver f. o. b. building site at Wyandotte County, Kansas, 190 prefabricated units at the prices and under the terms and conditions specified.

Under the terms of the contract Page-Hill delivered from its factory in Minnesota the prefabricated sections to the building site. Delivery was made by Page-Hill trucks operated by Page-Hill drivers. Wall and partition sections including exterior trim, siding, building paper, studs, etc., were attached. The interior partitions were also completed and prefabricated in the same manner. The ceiling sections were completed and prefabricated with the trim

already in place. Likewise the roof sections were prefabricated containing joists and insulation. There were certain loose items such as trim, shingles, etc., which were separate from the prefabricated sections. (All the above has been stipulated by the parties herein. Abstract pages 12-13.)*

In the development of Stony Point Heights Addition, petitioner purchased the lots, erected such foundations as were necessary and constructed thereon a platform constituting floor joists and subflooring from raw materials purchased from Kansas retailers and upon which Kansas sales tax was paid. The completed house disassembled came with the truck excluding deck material, oak floors, furnace and wiring.

Petitioner employed five carpenters and two laborers. (C. Ab. pp. 3 and 4.) When the Page-Hill truck arrived at the Stony Point Heights Addition, Wyandotte County, Kansas, the driver was directed by an employee of the petitioner to a specific house foundation—the building site. The truck usually parked in the street immediately in front of the foundation. The truck would then unload in the following manner: The Page-Hill driver unhooked from

* The record printed for the use of the Kansas Supreme Court consists of two volumes: The Abstract (Ab.) consisting of portions of the trial record designated and printed by Custom Built Homes Co., Inc., and the Counter Abstract (C. Ab.) constituting the remainder of the trial record designated and printed by the State Commission of Revenue and Taxation.

the semitrailer and installed a boom on said tractor. He would unbutton the canvas covering, sometimes with the assistance of the petitioner's employees then back the tractor to the semitrailer and hook onto a section of the panel which would be approximately twenty-four feet long. The petitioner's employees would hook the cable to the panel and the truck driver, remaining in the cab, would raise said panel from the semitrailer. Petitioner's employees would steady the panels hanging from the boom on the tractor and the driver would back the tractor into the proper position on the foundation. The panel then would be guided in place by the laborers of the petitioner. Petitioner's carpenters would temporarily attach the panel to the foundation by applying from one to three nails. One of the carpenters would then climb up the panel and release the hook of the crane. The carpenters would then steady the panel until the next section was installed and the two affixed together. During this whole operation the truck driver would not leave the cab (C. Ab. pp. 7, 8). This process was used for all sections including exterior and interior except the roof and ceiling sections which were unloaded by petitioner's employees, placed in the petitioner's truck and manually installed by petitioner's employees. (C. Ab. pp. 10, 11.) All labor and carpenter work was done by petitioner's employees while the house was under

construction except such work as was done by subcontractors of the petitioner. The Page-Hill driver drove the tractor and remained in the cab where he operated the power take-off which operated the crane. (C. Ab. p. 12.)

The State Commission of Revenue and Taxation sustained an assessment of compensating (use) tax in the amount of $22,133.57 plus interest of $1,257.33 for a total sum of $23,390.90 against Custom Built Homes on account of said use of out-of-state purchases (pet. app. A 1-3). Petitioner appealed to the District Court of Johnson County, Kansas. After a trial of which oral and documentary evidence was presented, the court entered findings of fact and conclusions of law in favor of the State Commission of Revenue and Taxation (pet. app. A 4-7). The District Court found that the taxpayer did use, store and consume tangible personal property within the state of Kansas and that said use was subject to Kansas compensating (use) tax.

On appeal, the Supreme Court of Kansas summarized the facts (pet. app. A 8-13), supporting the trial court's findings that the title to tangible personal property passed to the petitioner within the state of Kansas and that the same was subject to the Kansas compensating (use) tax. Said court further found that the journey of interstate commerce had ceased and that article 1, section 8, clause 3 of the U. S. Constitution commonly referred to as the commerce

clause did not prevent the state from taxing the use of this tangible personal property within this state. (Pet. app. A 26-28.) Accordingly, it affirmed the judgment of the trial court. (Pet. app. A 28.)

ARGUMENT

The respondent, State Commission of Revenue and Taxation, is cognizant of the body of cases which provide that a state may not tax personal property while in transit in interstate commerce. *Coe v. Errol*, 116 U. S. 517 (1886); *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1938). By the same token, there is a great wealth of cases of this court which substantiate the position that once the interstate journey has ceased the state or local authorities may properly impose a tax upon tangible personal property used, stored or consumed within the state. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814 (1937); *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 83 L. ed. 586 (1939); *McGoldrick v. Berwind-White*, 309 U. S. 33, 84 L. ed. 565.

It is the contention of the respondent that the interstate journey of these prefabricated sections had ceased within the state of Kansas and that the state could properly impose a tax upon the use of such property. Both the trial court, which had all of the facts before it, and the Supreme Court of Kansas who, on appeal had the facts abstracted for it,

found that the interstate journey had ceased and that the use was taxable in Kansas. The facts show that the petitioner directed the Page-Hill driver to the building site, that the employees of the petitioner hooked the crane to the panels, guided the same to their position on the foundation, affixed the panel to the foundation and released the cable attached to the Page-Hill truck. The Supreme Court of Kansas recognized this and stated:

> "We have no hesitance in declaring that at some point after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property and as such was used, stored or consumed by the appellant within the contemplation of the Kansas Compensating Tax Act prior to its becoming affixed as real property. The fact cannot be overcome that appellant's employees performed all the labor in constructing the house except for subcontractors working under the appellant. A contrary conclusion would be equivalent to holding that Page-Hill constructed the house, and this would be inconsistent with the evidence before the court." (184 Kan. 44-45.)

If a theory, such as the petitioner contends for, is adopted by this court, the state could be prevented from collecting tax on any building materials purchased outside its borders. It is apparent that if the contention of the petitioner is sustained, the vendor, by holding his hand on his ware until such time as his vendee affixed it to realty, could keep the

same in interstate commerce and defeat the state tax entirely.

Petitioner claims that the unloading is practically a part of the interstate journey and cites as authority a number of cases of this court in an attempt to substantiate its position. On examining the facts of these cases, one immediately discovers the unloading was done by the employees of the carrier. In the case at bar, the petitioner's employees were the moving parties in unloading the prefabricated sections. As a matter of fact, Page-Hill furnished only one employee, *i. e.*, the truck driver.

In addition to the above, the Supreme Court of Kansas properly found that the parties, *i. e.*, Page-Hill, and the petitioner, intended title to pass at the building site in Wyandotte County, Kansas. The contractional provision for delivery was "f. o. b. building site, Wyandotte County, Kansas." Under the law of the state of Kansas as evidenced by the opinion of the Supreme Court of Kansas, this operated to pass title to Custom Built Homes Co., Inc., at the building site in Wyandotte County, Kansas. The petitioner on page 10 of his petition infers that it is immaterial when title passed as the interstate journey had not ceased. We submit the interstate journey had ceased as the prefabricated sections had reached their Kansas destination, *i. e.*, the building site in Wyandotte County, Kansas. The

petitioner and not Page-Hill affixed these sections to real estate and, therefore, the Kansas tax was properly imposed upon the use of said property.

Contrary to petitioner's contention, the problem in this particular case is not one of great concern to the states or other home manufacturers. Despite the large number of sales of prefabricated homes in the state of Kansas, this is the first and only case in which there has been any question as to the state's right to tax the use of the property.

The fact remains that the petitioner did, under Kansas law, use, store and consume tangible personal property in this state after the same had reached its destination. The Supreme Court of Kansas, the highest court in this state, held that the Kansas compensating (use) tax act applied to the transaction. We submit that said holding is not contrary to the commerce clause of the United States Constitution.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CLARENCE J. MALONE,
Chief Attorney,
DEAN BURKHEAD,
Assistant Attorney,
Department of Revenue, State Office Building,
Topeka, Kansas.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 4 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. [redacted] 96

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION.
Respondent.

PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

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CUSTOM BUILT HOMES CO., INC.,
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KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

Comes Now, Custom Built Homes Co., Inc., and respectfully prays for a rehearing and reconsideration of its petition for certiorari heretofore filed in this cause. This petition is filed under Rule 58, Paragraph 2.

GROUNDS FOR REHEARING.

1. Recent publications and public statements occurring since the filing of the Petition for Certiorari indicate

that the Petition for Certiorari presents a matter of extreme public interest and importance.

2. The decision of the Kansas Supreme Court that interstate shipments may be taxed by a state is an original break-through of a line of authorities to the contrary that has been the law of this Court for many years; and said decision permits an Unconstitutional burden upon interstate shipments.

STATEMENT OF THE CASE.

The petition for certiorari in this matter was filed with this court on June 8, 1959. The order denying said petition for certiorari was entered by this court on October 12, 1959.

The question presented by the petition for certiorari was whether or not it was proper for the State of Kansas to tax an interstate shipment before the interstate journey had ceased, under the Kansas Compensating Use Tax, which is a tax upon personalty, and imposed upon the right to use, store or consume said personalty. The particular facts in this case involved a shipment of pre-fabricated wall, ceiling and roof sections of houses, the shipment of which originated in Minnesota and ended upon the foundation as part of the realty in the State of Kansas. Under the facts set forth in the petition, the seller, a Minnesota concern, shipped said sections interstate by means of its own trucks and delivered the sections by means of a crane attached to its truck, and the sections did not come to rest until they were attached to and a part of the realty. After they were nailed down as part of the unloading the hooks from the manufacturer's crane were removed from the sections and they stood permanently in place.

The result of this Court's denial of the petition of certiorari permits a decision of the Supreme Court of Kansas to the effect that Kansas has a right to tax these sections as personalty while they are still in the interstate journey.

It is, of course, not apparent from the order of this Court denying the petition whether that denial is on the grounds that said decision is not in conflict with the decisions of this Court or whether, even though it is in conflict, there is not a matter of sufficient public interest involved to warrant this Court's taking jurisdiction of the matter. In view of the fact that the decision of the Supreme Court of Kansas for which certiorari is sought, is diametrically opposed to the following Supreme Court cases which were cited in the petition for certiorari and admittedly the law (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938); *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937); *Sou. Pac. Co.* v. *Gallagher*, 306 U.S. 167 (1939)) (see argument of the respondent, page 12 of its brief), it must be assumed that this petition was denied for the reason that the matter is not of such public interest as would warrant this court's assuming jurisdiction of the matter.

I.

Question Presented Is One of Public Importance.

The importance to the public of this decision was presented in brief manner at page 7 of the petition for certiorari; but within the time following the filing of the petition and prior to the order denying the petition, a recent publication, in which experts on the subject were quoted, emphasizes and clarifies the importance of this erroneous decision of the Supreme Court of Kansas, and illustrates how it will more seriously affect interstate

transportation in the very near future. We refer to an article appearing in *Mechanix Illustrated*, September, 1959, issue, written by Frank Tinsley. For the convenience of the court, the illustrations appearing in that article and magazine and the important contents of the article are reprinted in the appendix hereto and incorporated in and made a part of this petition for rehearing.

Petitioner is well aware that *Mechanix Illustrated* is not a basic reference, but two things are true of this article: (1) It quotes aeronautical authorities who are recognized as the outstanding authorities in the field; and (2) it predicts a transportation method which is in principle identical to the one at bar, but which makes the fallacy of the Kansas decision so much more readily apparent.

The petitioner, who is very familiar with this field, was not aware of the scope of the effect of this decision as it would affect interstate transportation under the slightly different process of transportation described in the *Mechanix* article, but which is in principle fundamentally the same as that referred to in the petition for certiorari. As stated in the article, the helicopter, which was the principal subject, will be well capable of transporting an entire house (rather than completely prefabricated walls) from its manufacturing point in Minnesota to its resting place in Kansas; and as further pointed out, by carrying loads up to 50 tons, "it is not beyond the bounds of possibility to prefabricate a whole skyscraper floor in an outlying work yard, then to pick up the unit, complete with curtain walls and glazed windows, and airlift it to a midtown building site. The same is true with bridge spans; water, gas and fuel tanks; powerline towers and a host of other construction projects."

When this occurs, the decision of the State of Kansas, and other states who may choose to expand their taxing facilities, will hold that the states can tax these whole houses or these whole skyscraper floors as personalty while still in flight in the same manner that they have been successful in maintaining that Kansas can tax these pre-fabricated walls while in interstate shipment. If this occurs, as it has in Kansas, 50 states will, for the first time, be able to tax interstate shipments, even though the state of manufacture and assembly may have theretofore taxed the process and the work and the utility added to the structure in the state of manufacture.

It was for these reasons that petition for certiorari was sought and your petitioner tried to emphasize to the court the far-reaching effect of this decision. The article which we have incorporated in this petition for rehearing merely points up, in a more obvious way, the fallacy of the decision. As heretofore stated, the principle is exactly the same whether it be a whole house moved across the state line by helicopter, or whether it be a wall of that house moved across the state line by the manufacturer's truck and swung into position by the manufacturer's crane on the truck.

Further evidence of the important public issue involved is a recent public statement by Clarence J. Malone, chief attorney for the respondent. In the *Kansas City Star*, Tuesday, October 13, 1959, he is quoted as follows:

> "Malone said several millions of dollars actually would have been involved had the court held against the state's taxing theory, with other suppliers in heavy industry seeking to take advantage of the transportation plan involved."

II.

The "State's Taxing Theory" Referred to in the Above Quoted Statement Is a Complete Disregard of Established Law.

To summarize that theory, it is as follows:

1. The Kansas decision recognizes that the question of when title passes is immaterial and that the real question is: when does the interstate journey end? (petition for certiorari, page A-19, second paragraph).

2. The fact that the State cannot tax merchandise while in its interstate journey, but can only tax it after that journey has ceased, is well recognized in that the respondent in its brief quotes the identical cases as those relied upon by petitioner in its petition for certiorari (see page 12, brief for respondents in opposition). It is likewise uncontroverted by the Respondent that taxing by a state of an interstate shipment is an Unconstitutional burden thereon. *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (p. 6 Pet. Cert.)

3. The Kansas Tax Commission makes no effort to dispute the cases cited by petitioner to the effect that the interstate journey includes the entire unloading process (see petition for certiorari, pages 9 and 10). Hence, it must be assumed that the pre-fabricated walls in this case are still on their interstate journey until after they are affixed permanently to, and have become a part of, the real estate.

4. Despite these conclusions, the Supreme Court of Kansas had "no hesitancy in declaring that at some moment after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property * * * etc." (p. A-26, Pet. Cert.)

Of course the above theory of taxation is impossible—the interstate journey and the existence of the walls as a permanent part of the real estate were *overlapping* from a time standpoint. How, then, could a taxable moment exist even though infinitesimal?

This was not the case in the authorities cited in the petition for certiorari that recognized "instant taxable moments"—in each case it was at least possible for that instant to have occurred. Such is not so in this case. (Cases at p. 7, Pet. Cert.)

The Supreme Court of Kansas tried to justify the tax on the theory (page A-26, petition for certiorari) that the merchandise had passed "under the protection of state law and" had become "subject to the taxing and police power of the state". When that event occurred the merchandise was realty, and, conversely, in order for Kansas to tax personalty it, of necessity, had to tax an interstate shipment still under the protection of Federal law—not state law.

CONCLUSION.

The decision of the Supreme Court of Kansas from which certiorari is sought is admittedly contrary to the law as it existed heretofore. We sincerely believe that this court should face this problem at this time and make a decision which will establish a precedent consistent with the law as it has heretofore existed. As we have herein pointed out the fact situation presented in the instant case is not unique, but one which will occur regularly hereafter.

Respectfully submitted,

PAUL VAN OSDOL, JR.,
1212 Fairfax Building,
Kansas City, Missouri,
Counsel for Petitioner.

CERTIFICATE.

The undersigned of counsel for petitioner hereby certifies that the foregoing Petition for Rehearing and Reconsideration of Order Denying Petition for Certiorari is presented in good faith and not for delay, and that this petition is restricted to the grounds stated above.

SKIN-DIVING FOR TREASURE • GIANT CATAMARAN

MECHANIX
ILLUSTRATED
September 1969

WORKHORSES of the Sky

WORKHORSES OF THE SKY

By Frank Tinsley

How would you like to pick up your summer cottage and move it to Florida for the winter? Or, during the dog-days of August, loft it to some cool wilderness lake? Or would you prefer to airlift your comfortable houseboat across the wilds of Canada and, in a matter of hours, set her down on one of the uncrowded inlets of Hudson's Bay? What a way that would be to spend a wonderful vacation!

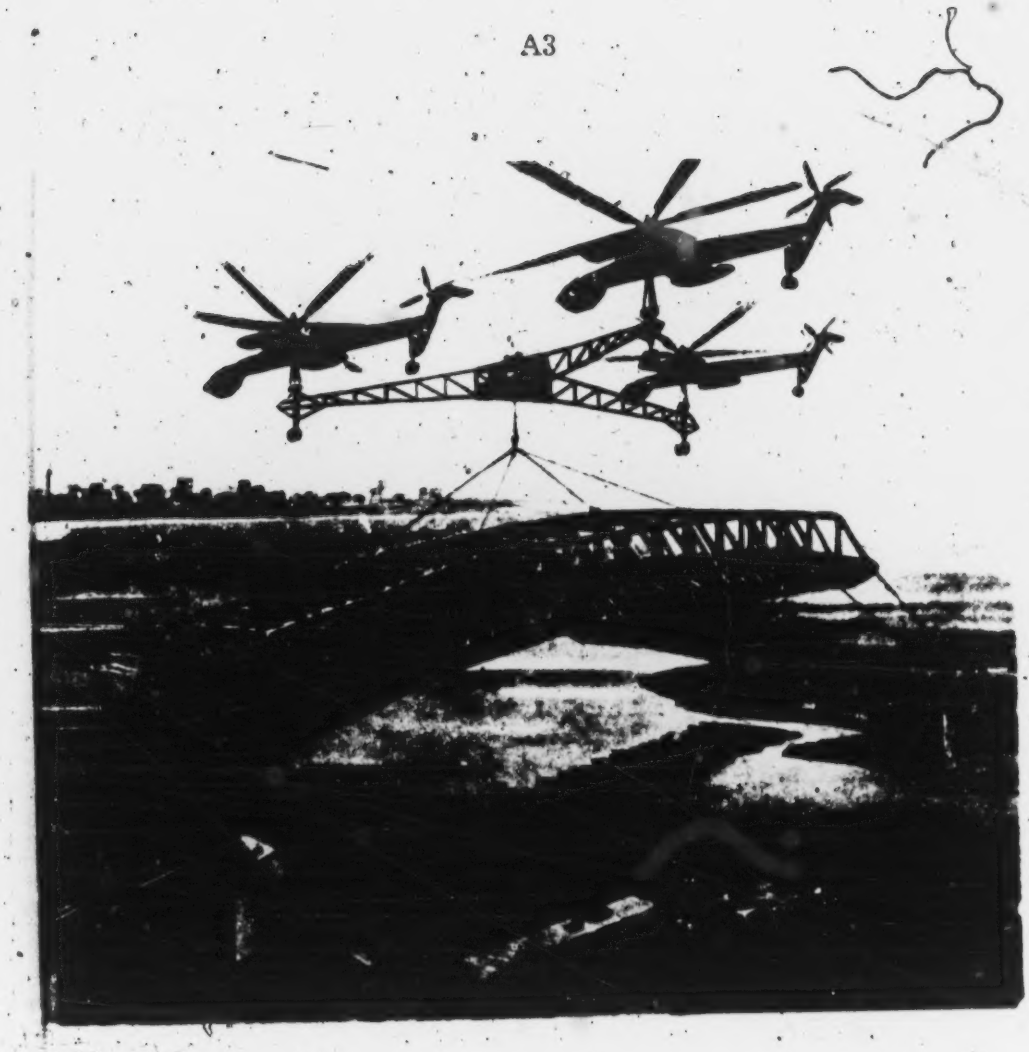
Sound crazy? It might have seemed so a year or two ago but not now. The advent of a practical sky-hook, a power-packed "flying crane" built to lift and carry heavy loads, has revolutionized our ideas about transportation. Long dreamed of by industrialists, construction engineers and the military forces, a flying towboat is now being tested at the Army's helicopter center at Fort Bragg, N. C. It is only an experimental model, put together with off-the-shelf parts of other copters. But even this preliminary model can hoist a six-ton load right out of a basket and fly it anywhere in the country.

Like the first practical helicopter, the 1939 VS-300, the new S-60 flying crane (see preceding page and the front cover) is a product of Sikorsky engineering genius. It combines the fivebladed rotor and twin reciprocating powerplants of the S-56 Marine troop carrier, with a stripped down, girderlike body. At the front end of this lifting beam is an underslung cabin for the crew and at the other, the tail surfaces and trim rotor. Completely surrounded by glass for maximum visibility, the pilot perches in a unique swivelling seat. During the jockeying necessary to latch on to a load, he can face backward to keep an eye on his target. After take-off, he swings around and faces forward for flight. Simple—but new!

This S-60 has been a fast mover. Emerging from the assembly hangars at Stratford, Conn., in April, it headed for an Army helicopter exhibition at Fort Bragg to show what it could do. It airlifted missiles, planted rows of two-ton telephone poles and lowered 4,500-pound floor sections in place on an army pontoon bridge. Currently, it is undergoing a complete program of flight testing.

Although the S-60 provides an immediate, moderate-cost answer to the flying crane problem, Sikorsky engineers are far from satisfied. Far larger and more powerful models are taking shape on their drawing boards, incorporating a wide variety of forms and power-plants. Among them is a twin-boom configuration that eliminates the tail fin and wheel to permit free access from the rear. Cargo and passenger pods can be backed into position and hooked up with ease and accuracy. Various types and combinations of gas turbines are under consideration, including General Electric T-64s and Pratt & Whitney JT-12s. These high-power, lightweight engines, driving outsized six-bladed rotors, promise a tremendous stepup in lifting capacity within the next year or so. Some of the models now in the design stage are expected to carry loads up to 50 tons.

"Such machines," says Lee S. Johnson, Sikorsky general manager, "could revolutionize the transportation business." He sees the military and commercial uses of the aerial crane "liimted only by man's imagination." MI's editors agree and some of these future possibilities are explored and illustrated here. Special consideration has been given to extending their prospective earning power. With this in mind, let's move ahead to 1965 and take a look at a typical day in the life of a flying crane.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. [redacted] 96

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

SUPPLEMENT TO PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 980.

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

SUPPLEMENT TO PETITION FOR REHEARING AND RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

The attached article, Appendix B, reached the undersigned's desk this morning, after mailing of Petition for Rehearing, and it is the first compilation published that we have been able to find in regard to the growth of the Pre-Fab Industry.

It has a direct bearing on Ground No. 1 of the Petition for Rehearing and Reconsideration of Order Denying

News

Vol. XIV; No. 11 November, 1959

THE PRE-FAB....

TOMORROW'S HOUSING GIANT

by WILLIAM C. SMITH, President
Housing Credit Corporation

RICHMOND CHAMP—A four bedroom 28' 18" x 40' 8", 1150 sq. ft. standard line home available in four beautiful elevations, carport, garage 2-12 and 5-12 roof

Home prefabrication in our country probably really began that fateful day when our revered forefather, Mr. Pioneer, first realized that his good neighbor did a better job of hewing out logs for his cabin than he himself could do.

As our era of specialization progresses, the single home builder, like Mr. Pioneer, constantly adds to his list material that he can buy cheaper and better than he can make himself. Technological

During World War II the term prefabrication became a term of common parlance. It was not an entirely pleasant word, as the war material shortages, hurry up deadlines and lack of skill or sufficient manpower caused the completion of a number of inferior and poor quality projects.

It is not surprising that many people in contact with the erection and maintenance of these second rate struc-

ance to prefabrication even today certain persons carry this feeling of dislike for prefabrication.

The Home Manufacturers Association, an organization made up of the leading manufacturers of home packages, have worked long and hard in dispelling many of these war gained prejudices. The HMA has been largely instrumental in correcting many of the mistaken ideas about today's prefab

The same process applies to any heavy load. Manufactured goods, household furniture, rush shipments of all sorts, even perishable fruits and vegetables can be packed in weather-proof or insulated cargo containers and flown expeditiously to their destinations. In modern America, house moving has become a familiar phenomena, especially on the West Coast. Jacking up the usual dwelling and rolling it over the road can be a tedious and expensive procedure. Power and phone lines must be by-passed or cut, streams and railroads detoured and motor traffic interrupted. How much easier it will be to lift one's house straight up out of its surrounding neighbors, airlift it to another community and set it gently down on prepared foundations.

In the construction field, the copter sky-hook fills a long felt need. Even with lofty top extensions and elaborate rigging, there is a limit to the practical length of crane booms. There is also a limit to their lifting capacity, which means that steelwork must be erected in bits and pieces. Handling large sub-assemblies is obviously more economical and it is here that the copter crane can do the trick--either singly or in multiple hitches. It is not beyond the bounds of possibility to pre-fabricate a whole skyscraper floor in an outlying work yard, then to pick up the unit, complete with curtain walls and glazed windows, and airlift it to a midtown building site. The same is true with bridge spans; water, gas and fuel tanks; powerline towers and a host of other construction projects.

HOUSE MOVING by air-lift could result in homes made in factories, flown to prepared foundations anywhere.

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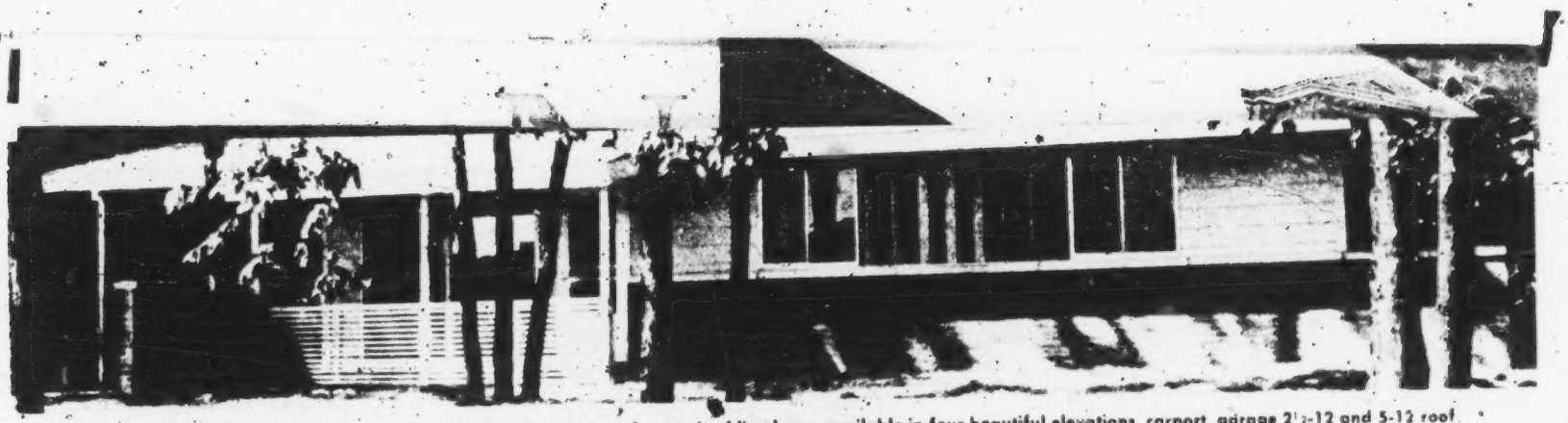
Petition for Certiorari. The court is urged to consider the statements, tables and predictions made in this article on the issue of public interest and the importance of the decision under review on this rapidly growing industry.

Respectfully submitted.

PAUL VAN OSDOL, JR.,
1212 Fairfax Building,
Kansas City 5, Missouri,
Counsel for Petitioner.

CERTIFICATE.

The undersigned counsel for petitioner hereby certifies that the foregoing Supplement to Petition for Rehearing and Reconsideration of Order Denying Petition for Certiorari is presented in good faith and not for delay, and that this supplement is restricted to the grounds set forth in said Petition for Rehearing.



RICHMOND CHAMP—A four bedroom 28' 18" x 40' 8", 1150 sq. ft. standard line home available in four beautiful elevations, carport, garage 2½-12 and 5-12 roof

Home prefabrication in our country probably really began that fateful day when our revered forefather, Mr. Pioneer, first realized that his good neighbor did a better job of hewing out logs for his cabin than he himself could do.

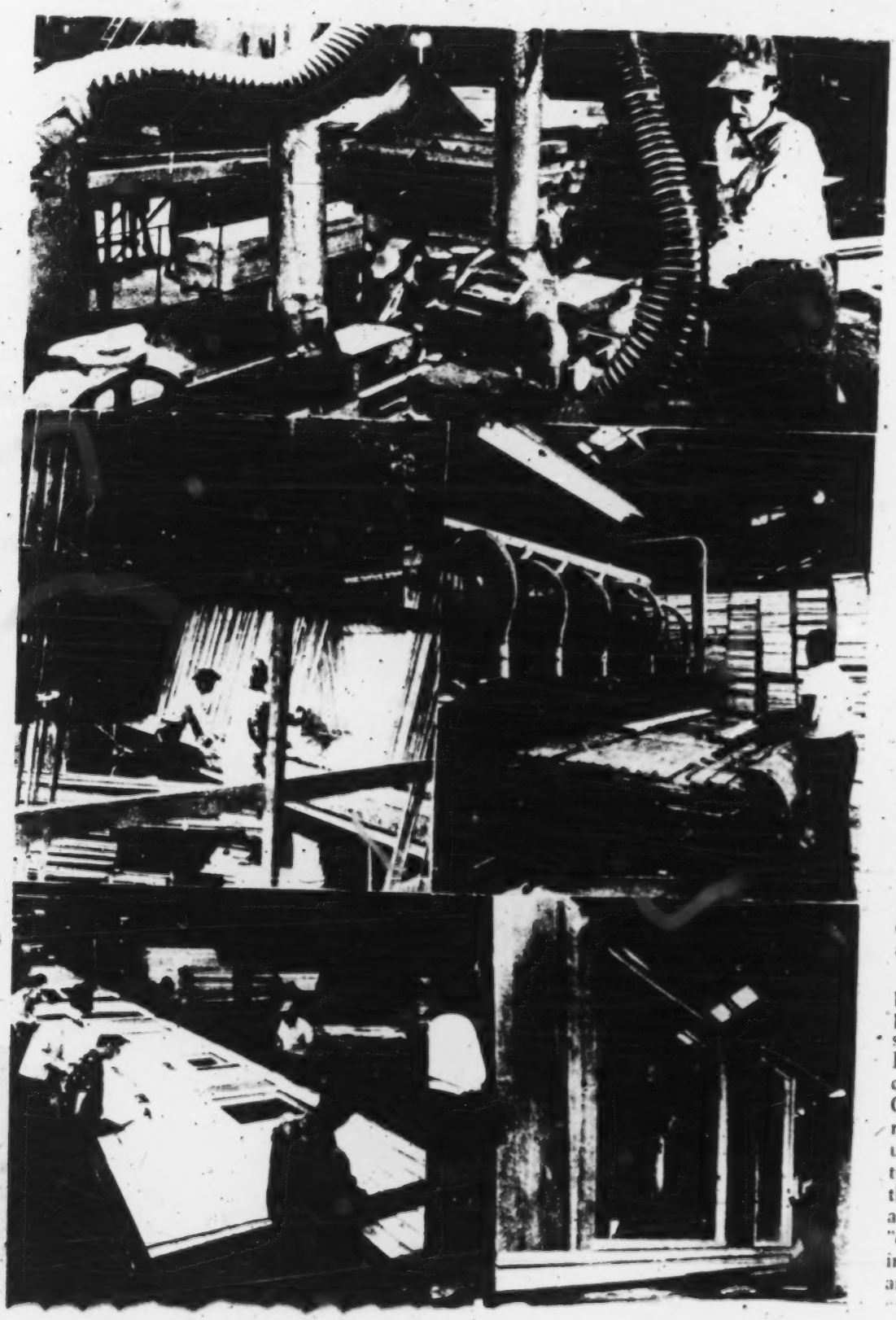
As our era of specialization progresses, the single home builder, like Mr. Pioneer, constantly adds to his list material that he can buy cheaper and better than he can make himself. Technological advances have given the home contractor many such items. Among them are finished lumber, pre finished doors; windows, plumbing, heating, wiring, roofing, all kinds of hardware and many other new and wonderful innovations.

During World War II the term prefabrication became a term of common parlance. It was not an entirely pleasant word, as the war material shortages, hurry up deadlines and lack of skill or sufficient manpower caused the completion of a number of inferior and poor quality projects.

It is not surprising that many people in contact with the erection and maintenance of these second rate structures were unfavorably prejudiced. Many lenders, municipal and government inspectors, and occupants became the core of much resistance to further prefabrication attempts, and out of all this there arose a definite public resistance to prefabrication, even today certain persons carry this feeling of dislike for prefabrication.

The Home Manufacturers Association, an organization made up of the leading manufacturers of home packages, have worked long and hard in dispelling many of these war gained prejudices. The HMA has been largely instrumental in correcting many of the mistaken ideas about today's prefab houses, and more and more top notch single family contractors are finding the advantages and merits of prefabrication.

Since the beginning of prefabrication, speed has been one of the major selling points. Under the Wherry Act, a pro-

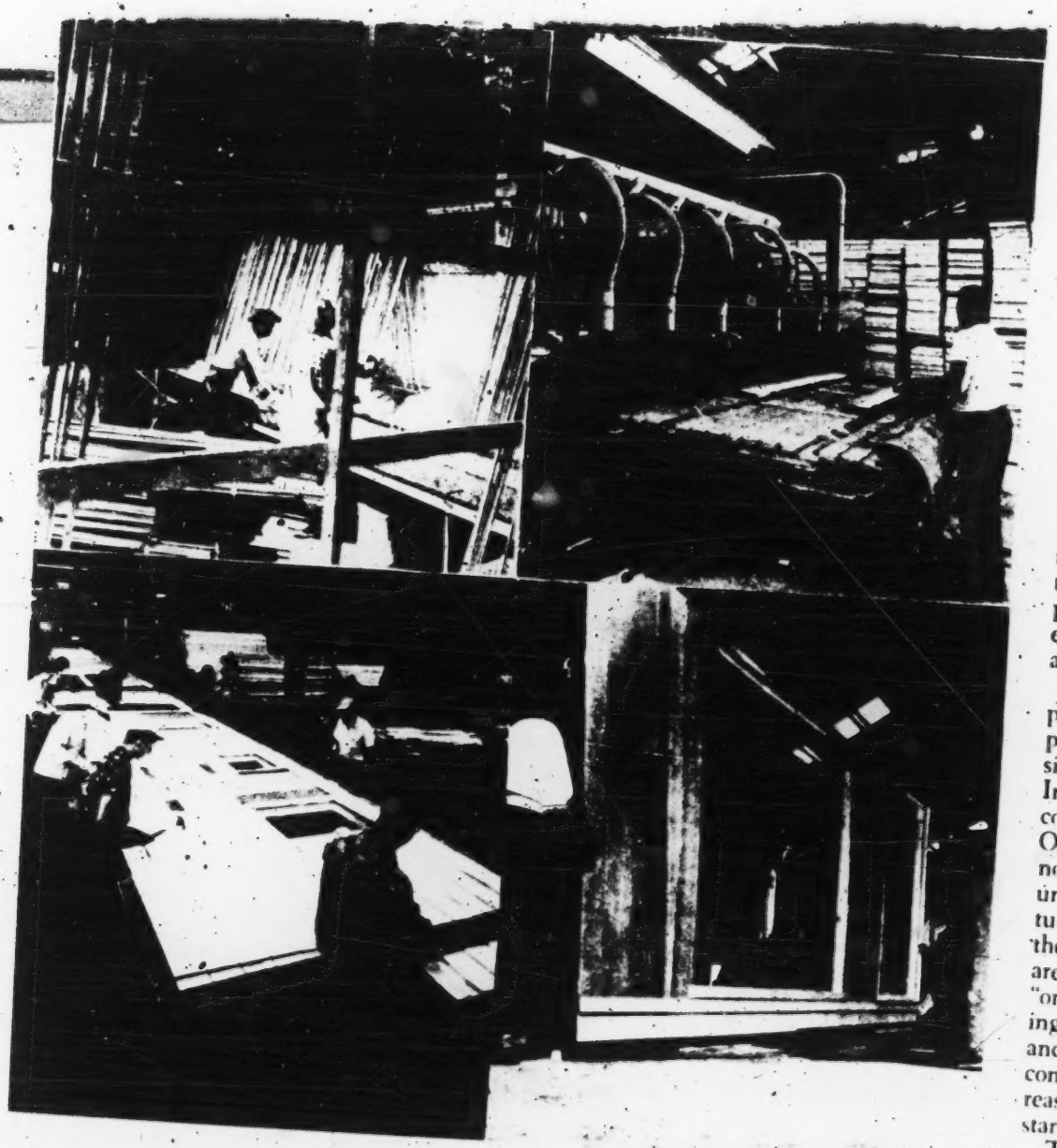


ect of 1,000 houses was built at Fort Bragg, N. C. In fact, over 20% of the defense housing was supplied by prefabbers and this figure does not include the many large conventional builders who use basic prefabrication methods in project building.

Today, however, the emphasis is away from speed and directed toward better design, better construction and better materials, providing more and more extras to the builder an' buyer and lowering the costs without sacrificing quantity of living space. One leading contractor who formerly built conventionally but who has been using a prefabber package for several years was asked why he no longer built conventionally. He replied, "Why, I'd have to go back to work." Seemingly one might accuse him of a jest, but the truth is that the prefab manufacturer has become the biggest single sub-contractor of these builders.

To see the efficient factory production of today's modern home manufacturing plant is certainly a revealing experience. One need not examine long statistical comparisons to realize why their costs are cheaper than field production. Specialization is the key and with the precision jigs and other highly accurate machinery, the manufacturer can hire labor cheaper, and in most instances, the unionized labor costs will run considerably under 10% of the retail sales price of the package. Added to this is the mass purchasing power which provides better acquisition costs and the elimination of costly lumber waste by advance planning.

From the prefab manufacturers viewpoint, all these advantages still do not provide them a dominant position in the single family home building industry. In 1958, the manufactured house accounted for only about 11% of the total. Of the nearly 980,000 "single family, non farm starts" only about 110,000 units were built by pre-fab manufacturers. This doesn't incorporate any of the figures of those large builders who are doing lesser degrees of prefabrication "on site" or in their own assembly buildings as no figures are available on these and the degree of prefabrication varies [illegible]



Manufacturing methods speed package house

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The major reason is the complexity and variety of local building codes which must be complied with before the house package is usable in any given

community. Some of these codes follow modern lines and are verbatim from the research evolved codes recommended by the builders and real estate associations. Some codes are more like Topsy, they just "growed," and in some instances the codes are specifically designed to shelter the local lumber yards, contractor, and masonry man, and contain a real premeditated intent to bar outsiders.

Probably the second biggest, but fastest diminishing, obstacle has been the financing problem. Lenders such as banks, insurance companies, savings and loan institutions and others are conservative by their very nature. Installment financing is a necessity to the home building industry as very few cash buyers exist. It has taken time to overcome the wartime created stigma against prefabrication. During the past few years only a few of the major lenders have not reversed previous policies and, in fact, many important lenders in the mortgage market have come to realize that there are inherent factors which justify a preferential treatment of manufactured home mortgages.

A third problem and obstacle occurs where the home manufacturer furnishes wiring, electrical fixtures, plumbing, hardware fixtures and heating units along with his package. Again the building codes enter the picture and also the separate plumbing, electrical and heating codes cause further problems to prefab standardization. Local electricians, plumbers and heating men use their influence with municipal authorities to prevent inclusion of these items in the house package. In some instances the local unions or associations would refuse to make final hook up and the codes prevented anyone but locally licensed persons from making this connection.

The home manufacturing industry has attacked the problem of growth in various other ways and expansion of these ideas and innovations moves steadily forward to capture new markets for this young industry. More and more we find the home manufacturer assisting the contractor in buying and developing land. The largest of the home manufacturers recently issued a $14 million issue of debenture bonds to implement their already active program.

TOTAL BUILDING STARTS EACH YEAR COMPARED TO MANUFACTURED HOME STARTS

Year	Manufactured Homes Shipped	Single Family U. S. Starts	Manufactured Home Percentage
1946	37,200	590,000	6.31%
1947	37,400	742,000	5.04%
1948	30,000	766,000	3.91%
1949	35,000	794,300	4.41%
1950	55,000	1,154,100	4.78%
1951	50,000	900,100	5.56%
1952	57,000	952,500	5.98%
1953	55,000	937,800	5.89%
1954	77,000	1,000,000	7.70%
1955	93,000	1,189,000	7.88%
1956	94,790	990,000	10.00%
1957	93,546	872,700	11.00%
1958	110,080	977,300	11.26%
*1959	135,000	1,100,000	12.00%

* Projected by the Home Manufacturer's Association, the national association represegting the industry. Note that figures are only for single family starts.

The area involved. Also, they often work closely with the builders in overall planning, forecasting and some even assist their builders in getting favorable sub contractor bids. Even others have entered into the business management phase of their builder's operation and may supervise his entire accounting function if this assistance is needed. Other manufacturers have their own land planning and building operations carried on through subsidiary corporation operations and a project manager will supervise the building only.

Design wise, the home manufacturers are able to employ the nation's leading architects and actually give the builder more variety of design than he can hope to furnish by himself. The outstanding talent of the country in color design and decorative methods are employed and most home manufacturers

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In recent years a majority of the manufacturers have formed acceptance corporations similar to the one this writer heads. This type auxiliary concern works with the builders in the field in processing the myriad of forms through FHA or VA, in financing model homes, in land planning, construction financing and placement of the mortgages the buyers need, to be able to purchase these finished homes.

Various of the home manufacturers have marketing departments that assist the contractors in selecting their right-priced house and best designed home for the area involved. Also, they often work closely with the builders in overall planning, forecasting and some even assist their builders in getting favorable sub-contractor bids. Even others have entered into the business management phase of their builder's operation and may supervise his entire accounting function if this assistance is needed. Other manufacturers have their own land planning and building operations carried on through subsidiary corporation operations and a project manager will supervise the building only.

Design wise, the home manufacturers are able to employ the nation's leading architects and actually give the builder more variety of design than he can hope to furnish by himself. The outstanding talent of the country in color design and decorative methods are employed and most home manufacturers furnish ample exterior variations to avoid any "row" housing appearance in subdivisions even though the same floor plan might be used exclusively.

Coming again to the quality picture, nearly all home manufacturers use construction grade lumber (formerly graded as No. 1) exclusively. Vast and extensive engineering research has proved the worth of roof trusses and prefab wall panels and many other technological improvements are used by various manufacturers. Some of these are complete cornice assemblies, pre-assembled

Continued on page 4

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WILLIAM C. SMITH

As President of Housing Credit Corporation, a subsidiary of Richmond Homes, Inc., Mr. Smith writes his views of the public relations job the entire manufactured homes industry has set out to accomplish in their drive to be the largest segment of builders in the new home construction field

A graduate of Coe College, William C. Smith received his J.D. degree from the University of Iowa Law College, and was a practicing attorney for 6 years. Following this, he became Manager of the mortgage loan department and Assyst. Trust Officer of an Iowa bank. In 1958, he became President of Housing Credit Corporation.

Tomorrow's Housing Giant

(Continued from page 3)

gable ends, completed and [illegible]her stripped doors, pre-hung interior doors, stressed skin plywood-wall panels, pre-installed windows, pre-assembled overhead sections, floor panels, ceiling panels, factory installed insulation, factory insulation, factory primed weatherproofed primed weatherproofed lumber and interior pre-finishing. Comparing a manufactured house stud for stud and piece by piece the manufactured construction will gain the better of the comparison in nearly all instances both as to quality of material and precision of assembly.

This writer would be remiss if he did not take this opportunity to espouse his own cause just briefly. Without too much fear of contradiction it can be said that probably the thing that is of top level importance to any builder is the quality and quantity of his financing. Without it he can't move, with it he still needs other favorable factors. Earlier in the article it was stated that lenders were moving toward manufactured products and here are some of the reasons: First, the time of erection allows the lender to be more assured of delivery of loans and less opportunity for this volatile market to fluctuate. Second, is the quality of material and of design that the lenders have seen in the manufactured product. Third, is the financial backing that the manufacturer is able to give to the transaction. If a builder gets into trouble the manufacturer can step in and see that the homes are completed properly. There are a number of other reasons such as simplicity of erection, use of name brands in house materials and the necessity of stress on good and sound engineering principles.

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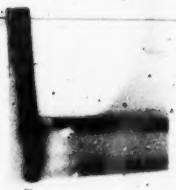

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With the fast moving developments in the financing end of the home construction business and its technological advances, it has become necessary for any larger builder to employ others to keep him posted of these changes. For this reason alone the home manufacturing industry should look forward to an increasing share of the home building industry increase. Some estimate that by 1970 the nation should have over 1.5 million new home, non-farm, single family starts per year. This should place the home manufacturers in a position to materially increase their output and capture an even larger percentage of the market for new homes.